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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

JEREMY OLSEN,

Plaintiff,

v.

XAVIER BECERRA, in his official
capacity as the Secretary of the United
States Department of Health and
Human Services,

Defendant.

No. 2:20-cv-00374-SMJ

PLAINTIFF'S REPLY IN SUPPORT
OF MOTION FOR ATTORNEYS'
FEES

PLAINTIFF'S REPLY IN SUPPORT
OF MOTION FOR ATTORNEYS'
FEES - 1



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1 Mr. Olsen's motion should be granted.

2 The Secretary did not contest any of the facts set forth in Mr. Olsen's motion.
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 4 Further, other than contending his position below and in this case was not frivolous,
 5 the Secretary did not dispute that all of the elements allowing for an award of fees
 6 under 28 U.S.C. § 2412(b) are present (*e.g.*, that Mr. Olsen was the prevailing party,
 7 that he is eligible for an EAJA award) or any of the legal bases/cases cited by Mr.
 8 Olsen. Likewise, the Secretary did not dispute the reasonableness of the fees
 9 requested, including the market rates charged. Thus, the Court need only decide
 10 whether the Secretary's position that a CGM is not "primarily and customarily used
 11 to serve a medical purpose" is "obviously wrong" and/or "groundless" (*i.e.*, whether
 12 that position is "frivolous"). In making that decision, the Court can consider both
 13 the activity before the Department and activity in this case and award fees if the
 14 conduct before either or both bodies was frivolous/in bad faith.
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19 Mr. Olsen's motion should be granted.

20 **DISCUSSION**

21 **A. The Secretary's Position Below and in This Litigation Was** 22 **Frivolous**

23 The idea that a CGM is not "primarily and customarily used to serve a
 24 medical purpose" is obviously wrong. That is why, so far, five district courts (*i.e.*,
 25 every court to consider the issue) has ruled against the Secretary. The four courts
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1 to reach an attorney's fees decision awarded fees to the plaintiffs for even having
 2 to litigate the issue. Along the way, those courts have described the Secretary's
 3 position using phrases such as "unreasonable", "arbitrary and capricious", "no
 4 evidence supports", "no reasonable basis", "no reasonable person would be
 5 satisfied", "string of losses", and "not reasonable." *See Whitcomb, Lewis, Bloom,*
 6 *and Zieroth* (citations omitted). Likewise, this Court characterized the Secretary's
 7 position as "not reasonable" (Decision at 7) and "unreasonable" (Decision at 9) and
 8 this Court noted the "particularly important" medical purpose of Mr. Olsen's CGM
 9 in protecting his transplanted kidney (Decision at 8). In short, the Secretary's
 10 position was/is "obviously wrong" and is frivolous.

15 The Secretary's principal justification is his assertion that it was "reasonable"
 16 to consider only CGMs that are "accurate enough" as covered durable medical
 17 equipment. *See, e.g.,* Opp. at 5. Of course, "accurate enough" is not a qualification
 18 under either the statute (42 U.S.C. § 1395x(n)) or the Secretary's regulations (42
 19 C.F.R. § 404.202). Further, "accurate enough" was not the basis for denial of Mr.
 20 Olsen's claim below. *See* ECF 2, Exhibit F at 8-9. Instead, the MAC denied Mr.
 21 Olsen's claim on the grounds that a CGM is not "primarily and customarily used to
 22 serve a medical purpose" because it is "precautionary"/"not for the primary medical
 23 purpose." Indeed, that is exactly how this Court described the MAC decision when
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1 granting summary judgment in Mr. Olsen's favor. *See* Decision [ECF 38] at 8 ("No
2 evidence supports the Appeals Council's conclusion that a CGM is not 'primarily
3 and customarily used to serve a medical purpose.'"). That position below was
4 frivolous as would have been any effort to defend that position in this Court.
5 Likewise, attempting to switch the basis for denial of Mr. Olsen's claim in this
6 litigation was frivolous. Defending a frivolous position adopted in an illegally
7 issued policy by switching the basis for denial does not make the Secretary's
8 position less frivolous.
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12 Moreover, as shown, additional evidence of the Secretary's bad faith is the
13 fact that the Secretary adopted the frivolous position in Mr. Olsen's case with actual
14 knowledge of the decisions in the *Lewis*, *Bloom*, and *Whitcomb* cases. *See* ECF 2,
15 Exhibit F at 9.
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18 In his moving papers, Mr. Olsen noted three other items that the Court should
19 take into consideration in making its determination. First, Mr. Olsen noted that, in
20 violation of the statute, the Secretary did not produce the administrative record until
21 ordered by this Court and that the Secretary's failure in that regard led to yet more
22 delay. Mot. at 7. The Secretary did not attempt to justify the failure to comply with
23 the basic rules of the review statute.
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PLAINTIFF'S REPLY IN SUPPORT
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1 Second, Mr. Olsen showed that even after this Court’s decision, the Secretary
 2 has continued to reject CGM claims on the grounds that a CGM is not “primarily
 3 and customarily used to serve a medical purpose.” Mot. at 10 (Exhibit A – MAC
 4 decision dated February 26, 2021 concerning Linda Smith). Indeed, the Secretary’s
 5 continued rejection of CGM claims on the frivolous grounds combined with the
 6 Secretary’s efforts to maximize the judicial and party resources means that at least
 7 *seven* federal judges will consider the Secretary’s frivolous position that a CGM is
 8 not “primarily and customarily used to serve a medical purpose.”¹ Thus, the
 9 attorney fee awards to date have not had the deterrent effect intended by EAJA.
 10 Mot. at 2 (purpose of EAJA is “to deter the unreasonable exercise of Government
 11 authority” *citing Ardestani v. I.N.S.*, 502 U.S. 129, 138 (1991)).² Again, the
 12 Secretary did not respond.
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21 ¹ On April 5, 2021, Mrs. Smith filed suit in Utah seeking to overturn the Secretary’s
 22 denial of her CGM claim. *See Smith v. Becerra*, Case No. 21-cv-047 (D. Utah).

23 ² Indeed, the fact that the Secretary still contends that his position was “reasonable”
 24 and “substantially justified” in opposition to this fees motion indicates that fee
 25 awards at less than market rates do not deter the Secretary.
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1 Third, Mr. Olsen noted the Secretary's objection to venue when sued in the
 2 Secretary's home district leading to delay, increased expense, and maximizing the
 3 judicial resources needed to resolve this matter.³ Mot. at 5-6.

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 5 In response, the Secretary offers comments regarding the class action matter,
 6 also pending in the District of Columbia. Opp. at 2-3. Respectfully, it is very
 7 difficult to follow how the Secretary thinks the presence of the class action in D.C.
 8 justified his objection to litigating in his home district, forcing a sixth federal judge
 9 to consider the frivolous position, and imposing delay and increased expense on Mr.
 10 Olsen. As near as Plaintiff can tell, the Secretary intimates that the reason the
 11 Secretary objected to venue in his home district was because he did not want the
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 17 ³ By way of background, the Medicare Act has two venue provisions. One
 18 provision (42 U.S.C. § 1395ff(b)(2)(C)(iii)) provides for venue either where the
 19 beneficiary resides or in the District of Columbia. Believing this provision
 20 applicable, both the class action plaintiffs and Mr. Olsen filed suit in the District
 21 of Columbia. See ECF No. 3 at ¶ 3. Another provision (42 U.S.C. § 405(g))
 22 provides for venue where the beneficiary resides. In *Olsen* (but not the class
 23 action), the Secretary contended that § 1395ff(b)(2)(C)(iii) only applied to
 24 "expedited appeals" and, on review, Mr. Olsen did not contest that.
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1 same judge to consider Mr. Olsen's case. Thus, it appears the Secretary contends
 2 that he intentionally multiplied the proceedings and caused the expenditure of
 3 additional judicial and party resources because he was concerned that a particular
 4 judge might rule on an issue.⁴ Rather than justification, that appears to be an
 5 argument supporting the award of fees in this case.
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8 **B. Response to the Secretary's Other Comments**

9 The Secretary points to the award of fees under 28 U.S.C. § 2412(d) (*i.e.*,
 10 lack of "substantial justification" fees) in other four cases and contends that his fifth
 11 repetition of the same conduct should not result in the Secretary bearing the full
 12 cost of his frivolous position. Opp. at 6-7 ("The Secretary's position here is,
 13 substantively, no more or less frivolous than it was in those earlier cases."").
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 18 ⁴ To the extent that the Secretary contends that a decision in Mr. Olsen's case would
 19 somehow advance the merits of the class action, that position is unfounded. By
 20 the time the class action was filed in December 2018, the *Whitcomb*, *Lewis*, and
 21 *Bloom* courts had already rejected the Secretary's position. Thus, a fourth decision
 22 would not be expected to have any effect. Conversely, having the same judge and
 23 counsel address a matter is efficient and conserves resources which are particularly
 24 important in a *pro bono* matter.
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1 In Plaintiff's view, the Secretary's position has always been frivolous. The
 2 plaintiffs in those earlier cases hoped that an award of even only a portion of the
 3 attorney's fees would cause the Secretary to reconsider the misguided position and
 4 achieve the deterrence effect contemplated by EAJA.⁵ Each successive suit has
 5 demonstrated that lesser measures will not deter the Secretary. Indeed, as the cases
 6 have piled up, the Secretary has become increasingly explicit in his defiance of the
 7 courts' rulings on the issue and, as demonstrated in the MAC's decision in Mr.
 8 Olsen and Mrs. Smith's cases, now contends that the court should defer to the
 9 Secretary's greater wisdom. Thus, while the plaintiffs (and perhaps the courts) in
 10 the earlier cases hoped that a softer approach would be effective, the Secretary's
 11 defiance has demonstrated that that will not be the case. Further, each award of fees
 12 at less than market rates means that the beneficiaries (through their counsel) bear
 13 the cost of the Secretary's misconduct. Having chosen for a fifth time to advance a
 14 frivolous position, the Secretary should bear the full cost of that course of conduct.

15 The Secretary's comments regarding fees under 28 U.S.C. § 2412(d) (*i.e.*,
 16 lack of "substantial justification" fees) are irrelevant. Opp. at 9-10. Mr. Olsen does
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 25 ⁵ In case it was not clear already, the undersigned was *pro bono* counsel in the
 26 *Whitcomb, Lewis, Bloom, and Zieroth* cases.
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1 not seek fees under that provision. Mr. Olsen seeks a determination that the
2 Secretary's position was/is frivolous and for the Secretary to bear the full cost of
3 that frivolous position.
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5 **C. Updated Fee Amount**

6 As noted in Mr. Olsen's moving papers, under EAJA, fees incurred in
7 seeking an award of fees are also recoverable. Mot. at 3. Attached as Exhibits A
8 and B to the *Declaration of Casey M. Bruner* [ECF 49] are updated billing invoices
9 reflecting the additional fees incurred in drafting the fees briefing. The update
10 brings the total fees incurred in this matter to \$75,119.00. As noted in Mr. Olsen's
11 moving papers, Plaintiff has chosen to exercise billing discretion and reduce these
12 fees by 10% across the board thus reducing the requested fees to \$67,607.10.
13 Combined with \$1,068.85 in expenses, the total award requested is \$68,675.95.
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18 **CONCLUSION**

19 Mr. Olsen's motion should be granted. The Secretary's position was and is
20 frivolous and it appears that only an EAJA award so stating has any prospect of
21 influencing the Secretary's conduct.
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1 Dated this 15th day of April, 2021.

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3
4
5 By: s/ Casey M. Bruner

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PLAINTIFF'S REPLY IN SUPPORT
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April 2021,

1. I caused to be electronically filed the foregoing PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

James.Bickford@usdoj.gov

2. I hereby certify that I have caused to be mailed by United States Postal Service the foregoing document to the following non-CM/ECF participants at the addresses listed below:

Jeffrey Blumenfeld
Lowenstein Sandler LLP
2200 Pennsylvania Avenue, NW, Suite 500E
Washington, DC 20037

3. I hereby certify that I have mailed by United States Postal Service the foregoing document to the following CM/ECF participants at the address listed below: **None.**

4. I hereby certify that I have hand-delivered the foregoing document to the following participants at the addresses listed below: **None.**

s/ Casey M. Bruner

Casey M. Bruner, WSBA #50168

PLAINTIFF'S REPLY IN SUPPORT
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